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Strong But Sidelined: A Call For The Elimination Of The Contact Sport Exception Through The Lens Of Title VII's Disparate Treatment Analysis

Katlynn Dee

STRONG BUT SIDELINED: A CALL FOR THE ELIMINATION OF THE CONTACT SPORT EXCEPTION THROUGH THE LENS OF TITLE VII'S DISPARATE TREATMENT ANALYSIS

"If we show emotion, we're called dramatic.
If we want to play against men, we're nuts.
And if we dream of equal opportunity, delusional.
When we stand for something, we're unhinged.
When we're too good, there's something wrong with us.
And if we get angry, we're hysterical, irrational, or just being crazy.
But a woman running a marathon was crazy. A woman boxing was crazy.
A woman dunking? Crazy. Coaching an NBA team? Crazy.
A woman competing in a hijab, changing her sport, landing a double-cork 1080
or winning 23 grand slams, having a baby and then coming back for more?
Crazy, crazy, crazy, crazy and crazy.
So, if they want to call you crazy? Fine.
Show them what crazy can do."[1]

Introduction

Society is changing; female involvement is changing. With these changes must come the removal of historic stereotypes about a woman's ability to participate in sports. The notion that women are inherently weak and delicate has no place in the world of sports, where some of the strongest females dominate. Gender distinctions have been largely reduced in employment and the military, yet they remain prevalent in athletics.[2] While employment laws and military regulations open the doors to women in physically demanding jobs and the top-ranked combat positions, education laws close the gates to football fields and rope off the basketball courts from female ath-

1. *Dream Crazier* (Nike commercial broadcast Feb. 24, 2019).

2. *See generally* 42 U.S.C. § 2000e-2(a)(1) (2012); *see also* Tia Ghose, *Women in Combat: Physical Differences May Mean an Uphill Battle*, Life Science (Dec. 7, 2015), https://www.livescience.com/52998-women-combat-gender-differences.html.

letes.[3] The contact sport exception in Title IX prohibits female athletes from playing contact sports with the opposite sex.[4] This policy of exclusion prevents gender equality in collegiate athletics and must be rescinded.[5]

This Comment argues that the legislature must eliminate the contact sport exception from Title IX to effectuate its purpose: to provide equal opportunity for women in education and educational activities.[6] More specifically, this Comment calls for the elimination of the contact sport exception because: (1) the exception relies on generalized stereotypes about the physical abilities of women and does not account for their individualized qualifications; (2) the sex of the athlete does not inhibit her ability to play the sport because sex does not go to the essence of the contact sport; and (3) the asserted safety rationale is pretext for the legislature's intent to protect revenue-producing sports like men's football and basketball from female encroachment.

This Comment will briefly discuss the unconstitutionality of the contact sport exception under an Equal Protection analysis. Then it will conduct a cross-statutory analysis between Title IX and Title VII to articulate the inconsistency of the contact sport exception with the Civil Rights Act as a whole. The cross-statutory analysis is not to be construed as an alternative litigation strategy for female athletes, but rather an argument by analogy to support the elimination of the contact sport exception from Title IX.

Part I of this Comment will provide a background on the current remedial paths for gender discrimination in athletics, including Title IX and the limitation of the contact sport exception, and the Equal Protection Clause. Part I will also provide a background on the parallel provisions and statutory analysis of Title VII. Part II of this Comment will continue by analyzing the asserted safety rationale for the contact sport exception under the Equal Protection Clause and Title VII to demonstrate the unconstitutionality and inconsistency of this policy of exclusion. Part III of this Comment will conclude by discussing the impact of eliminating the contact sport exception from Title IX. Part III will also discuss the impact of the new "name, image, and likeness" laws on the ability of a female athlete to utilize this Title VII analysis to combat the contact sport exception as a form of systemic disparate treatment against female athletes.

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3. *Id.*; Ghose, *supra* note 2.

4. 34 C.F.R. § 106.41(b) (2000).

5. *See* Lindsay N. Demery, *What About the Boys? Sacking the Contact Sports Exemption and Tackling Gender Discrimination in Athletics*, 34 THOMAS JEFFERSON L. REV. 373, 390 (2012).

6. 20 U.S.C. § 1681 (2018).

I. Background

This Part will look at the current options that female athletes have in combating sex discrimination in athletics. First, Section A will provide a historical analysis of Title IX by looking at the legislative history and the judicial interpretation of the contact sport exception. After looking at the failed attempts at recourse through Title IX, Section B will look at how courts have allowed female athletes to recover under the Equal Protection Clause. Lastly, Section C will look to Title VII's parallel provisions in employment discrimination cases and statutory analysis.

A. Title IX

In 1972, President Richard Nixon signed Title IX of the Education Amendments into law.[7] Title IX bars sex discrimination by education programs and activities that receive federal funding. The Act states: "No person in the United States shall, on the basis of sex, be excluded from participation in, be denied the benefits of, or be subjected to discrimination under any education program or activity receiving federal financial assistance . . . ."[8] The Act covers the entire educational institution and all of its educational activities and programs if *any* program within the entire educational institution receives *any* federal funding.[9] In other words, virtually all private and public colleges, universities, and secondary education schools are covered under Title IX.

Title IX is enforced by the U.S. Department of Education and the Office for Civil Rights (OCR).[10] The OCR has the authority to strip an educational institution of its federal funding for violating Title IX but has yet to do so.[11] In addition to administrative remedies, the Supreme Court recognized in *Cannon v. University of Chicago* that individuals have an implied private right of action against educational institutions that violate Title IX.[12] Since individual plaintiffs are not required to exhaust administrative remedies before bringing a Title IX suit, most Title IX claims arise from a private action in the courts.[13]

7. § 1681.

8. § 1681.

9. Ethan Brown, *Athletics and Title IX of the 1972 Education Amendments*, 10 Georgetown J. of Gender & L., 505, 508 (2009).

10. § 1681.

11. § 1681; Title IX Basics: Breaking Down the Barriers, Nat'l Women's Law Ctr., at 13 n.10 https://nwlc.org/wp-content/uploads/2015/08/BDB07_Ch2.pdf [hereinafter Title IX Basics].

12. *See* Cannon v. Univ. of Chicago, 441 U.S. 677 (1979). The Court found that a private right of action was critical to achieve Congress's intent "to provide individual citizens effective protection against [discriminatory] practices." *Id.* at 704. *See also* Title IX Basics, *supra* note 11, at 23.

13. *See infra* notes 28–38 and accompanying text.

Additionally, the Court recognized in *Franklin v. Gwinnett County Public School* that monetary damages are available under Title IX.[14]

Although Title IX is often used to combat gender discrimination in sports, the statute itself does not mention sports. In fact, the words "sports" and "athletics" do not appear anywhere in the statute. The original intent of Title IX was to promote gender equality in areas such as enrollment and teaching positions, not to address gender inequalities in athletics.[15] The potential expansion of Title IX to athletic programs sparked debate. The director of the National Collegiate Athletic Association (NCAA) believed that Title IX would result in the "possible doom of intercollegiate sports."[16] The NCAA thereafter implemented extensive lobbying efforts to exempt intercollegiate athletes from Title IX altogether.[17] In response to pressure from the NCAA, Senator John Tower proposed an amendment excluding any intercollegiate athletic programs that "provide gross receipts or donations to the institution necessary to support that activity" from Title IX.[18] In other words, the Tower Amendment sought to exclude any revenue-producing sport from Title IX. During the congressional debate, Senator Tower explicitly stated his desire to protect ticket sales produced by men's football and basketball in order to preserve the viability of those athletic programs.[19] Senator Tower further stated that "[g]rave concern has been expressed that the . . . rules will undercut revenue raising sports programs and damage the overall sports

14. Franklin v. Gwinnett Cty. Pub. Sch., 503 U.S. 60 (1992). The Court relied on the well-established principle that all remedies are presumed to be available to accompany a federal right of action "unless Congress has expressly indicated otherwise." *Id.* at 66.

15. 118 CONG. REC. 5804 (1972) (statement of Sen. Bayh). As the principal Senate sponsor, Senator Birch Bayh, explained, Title IX was designed to be "a strong and comprehensive measure [that would] provide women with solid legal protection from the persistent, pernicious discrimination which is serving to perpetuate second-class citizenship for American women." *Id. See also* Diane Marshall-Freeman et al., *Title IX's Three-Prong Test in Athletics*, NAT'L SCH. BD. ASS'N, COUNCIL OF SCH. ATT'YS (2017), https://cdn-files.nsba.org/s3fs-public/09.%20Marshall Freeman%20Title%20IX%20ThreeProng%20Test.pdf.

16. TITLE IX: THE EVOLUTION OF WOMEN'S RIGHTS IN EDUCATION AND SPORTS, THE TOWER AMENDMENT, https://90600661.weebly.com/the-tower-amendment.html (quoting Walter Byers, director of the NCAA) (last visited Apr. 27, 2020).

17. B. Glenn George, *Fifty/Fifty: Ending Sex Segregation in School Sports*, 63 OHIO ST. L.J. 1107, 1113–14 (2002).

18. 120 CONG. REC. 15322–23 (1974).

19. *Id.* Senator Tower claimed, "I want to emphasize that one of the prime reasons for my wanting to preserve the revenue base of intercollegiate activities is that it will provide the resources for expanding women's activities in intercollegiate sports." However, the clear presence of pressure from the NCAA immediately prior to this amendment proposal suggests that Senator Tower simply wanted to prevent Title IX from negatively impacting the revenue-producing power houses of men's basketball and football.

program of the institution."[20] Essentially, the congressional debate surrounding the Tower Amendment emphasized the legislature's concern about appeasing the public's desire to protect men's basketball and football from female encroachment.[21] The Tower Amendment failed, however, and Congress adopted the Javits Amendment, which diverted the enforcement of Title IX's anti-discrimination requirement to the OCR and "directed the Secretary of Health, Education and Welfare (HEW) to prepare implementing regulations for intercollegiate athletics, with 'reasonable provisions concerning the nature of particular sports.'"[22] One of these regulations was the contact sport exception.

1. The Contact Sport Exception

In 1975, HEW finalized its first set of regulations concerning Title IX's applicability to particular sports.[23] The 1975 regulations expanded on Title IX by requiring educational institutions to provide an equal opportunity for both sexes in any "interscholastic, intercollegiate, club or intramural athletics" (the "equal opportunity requirement").[24] The regulations provided a ten-factor test of compliance for this equal opportunity requirement.[25] In addition, the regulations explicitly allowed institutions to create sex-segregated sports teams and to exclude women from contact sports (the "contact sport exception") by providing as follows:

> (b) Separate Teams. Notwithstanding the requirement of paragraph (a) of this section, a recipient *may operate or sponsor separate teams for members of each sex* where selection for such teams is based upon competitive skills or the activity involved is a contact sport. However, where a recipient operates or sponsors a team in a particular sport for members of one sex but operates or sponsors no such team for members of the other sex, and athletic opportunities for members of that sex have previously been limited, *members of the excluded sex must be allowed to try-out for the team offered unless the sport involved is a contact sport.* For the purposes of this part, contact sports include boxing, wrestling, rugby, ice hockey, football, basketball and other sports the purpose or major activity of which involves bodily contact.[26]

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20. *Id.* at 15323.
21. *Id.*; George, *supra* note 17.
22. S. CONF. REP. No 1026, 93rd Cong., 2d Sess. 4271 (1974); George, *supra* note 17, at 1114.
23. S. CONF. REP. No 1026; George, *supra* note 17, at 1114.
24. 34 C.F.R. § 106.41(a) (2000).
25. *See* § 106.41(c).
26. § 106.41(b) (emphasis added).

In other words, educational institutions are only required to let women try out for men's teams if (1) there is no equivalent women's team offered at that educational institution, and (2) the sport is not a contact sport. Educational institutions, therefore, do not have to permit a qualified female athlete the chance to compete for a spot on a men's team if the sport is a contact sport.

Courts have interpreted the contact sport exception as a complete bar to Title IX liability for any type of gender discrimination in a contact sport.[27] A court's inquiry into discrimination halts once it is determined that the sport qualifies as a contact sport under Title IX. For example, the courts in *Barnett v. Texas Wrestling Ass'n* and *Adams v. Baker* held that the schools were free to exclude girls from mixed-gender wrestling matches without fear of Title IX liability because wrestling is enumerated in the HEW regulations as a contact sport.[28] If the sport does not fall within one of the enumerated contact sports, the courts have used the language "other sports the purpose or major activity of which involves bodily contact" as a catchall.[29] For example, the courts in *Kleczek v. Rhode Island Interscholastic League* and *Williams v. School District of Bethlehem* held that field hockey is a contact sport under the "bodily contact" provision of the contact sport exception and is thus exempt from Title IX liability.[30]

The case *Mercer v. Duke University* was the first and only time that a court has upheld a Title IX action for gender discrimination in a contact sport.[31] Mercer, an all-state kicker in high school, tried out for the men's football team at Duke and made it. She regularly participated in practices, conditionings, and scrimmages—in one of which she kicked a game-winning twenty-eight-yard field goal.[32] While on the team, however, Mercer alleged that the coach made several offensive comments toward her, including "asking her why she was interested in football, wondering why she did not prefer to participate in beauty pageants rather than football, and suggesting that she sit in the stands with her boyfriend rather than on the sidelines."[33] Mercer was subsequently cut from the team.[34] She filed suit, alleging that the foot-

27. George, *supra* note 17, at 1115.

28. 16 F. Supp. 2d 690, 694–95 (N.D. Tex. 1998); 919 F. Supp. 1496, 1503 (D. Kan. 1996).

29. 34 C.F.R. § 106.41(b).

30. 768 F. Supp. 951, 955–56 (D.R.I 1991); 998 F.2d 168, 171 (3d Cir. 1993).

31. 190 F.3d 643, 644 (4th Cir. 1999).

32. *Id*. at 645.

33. *Id.* at 645; Kate Stone Lombardi, *SPORTS; A Victory for a Girl Who Loved to Kick*, N.Y. TIMES (Oct. 22, 2000), https://www.nytimes.com/2000/10/22/nyregion/sports-a-victory-for-a-girl-who-loved-to-kick.html.

34. *Mercer*, 190 F.3d at 645.

ball coach excluded her from the team because of her sex.[35] Although football is a contact sport, the court ultimately found that "[o]nce an institution has allowed a member of one sex to try out for a team operated by the institution for the other sex in a contact sport, [the contact sport exception] is simply no longer applicable, and the institution is subject to the [anti-discrimination clause]."[36] Therefore, the school was required to treat Mercer in a nondiscriminatory manner once the coach agreed to let Mercer try out for the team. The school could have avoided liability, however, by simply refusing Mercer the opportunity to try out for the team—a decision that would have been protected by the contact sport exception.[37]

Although *Mercer* may be viewed as a victory for women in sports, the case provides educational institutions with a liability loophole. Instead of risking liability, educational institutions can simply refuse to let any female athletes, individually qualified or not, try out for men's contact sports. *Mercer*, therefore, disincentivizes educational institutions from allowing female athletes to try out for a men's contact sport team entirely.[38]

2. Three-Part Test for Compliance

After the 1975 regulations, educational institutions complained about the ambiguity of the equal opportunity requirement and sought further advice on how to ensure compliance.[39] In an attempt to resolve this ambiguity, HEW released the 1979 Policy Interpretation.[40] The Policy Interpretation redefined "equal opportunity" and established a three-part test to determine whether an institution is in compliance with Title IX.[41] The three-part test required educational institutions to meet one of the following to be in compliance with Title IX:

(1) show that the school provides athletic opportunities "substantially proportionate" to each sex's enrollment;

35. *Id.* (Mercer notes that the coach allowed several less-qualified male walk-on kickers to remain on the team).

36. *Id.* at 648.

37. George, *supra* note 17, at 1122.

38. *Id.* at 1109.

39. *Id.* at 1117; Demery, *supra* note 5, at 379; Tanya E. Dennis, *Why Is Your Grass Greener than Mine? The Need for Legal Reform to Combat Gender Discrimination in Professional Sports*, 50 New Eng. L. Rev. 347, 354 (2016) (In 1978, the Department of Education received merely 100 complaints alleging discrimination in athletics against more than 50 institutions of higher education.).

40. OCR Policy Interpretation, 44 Fed. Reg. 71,413 (Dec. 11, 1979).

41. OCR Policy Interpretation, 44 Fed. Reg. at 71,418.

(2) establish "a history and continuing practice of program expansion which is demonstrably responsive to the developing interest and abilities of the members of the sex;" or

(3) demonstrate that "the interests and abilities of the members of that sex have been fully or effectively accommodated by the present program."[42]

Under the first alternative, the substantial proportionality test, the number of female athletes must be substantially proportionate to the number of female students.[43] In 1996, the OCR clarified that the number of teams allotted for each sex should be substantially proportionate if there is a sufficient number of interested and able students and a sufficient amount of available competition to sustain a viable intercollegiate team.[44] The substantial proportionality test is often used by courts as a feasible option.[45]

The second alternative, the continuing practice and program expansion test, looks at the institution's history of program expansion as a response to the developing interests and abilities of female students.[46] This second alternative is rarely used because it was intended to give institutions that had few women's teams in the 1970s some time for adjustment.[47]

The third alternative, the effective accommodation of athletic interests and abilities test, looks at the different levels of athletic interests to determine if the imbalanced gender representation in athletes is a product of impressible discrimination or simply a result of disinterest.[48] If the educational institution can show that the lack of female participation in athletics is a result of a lack of interest in sports by female students, then the disproportionate sexual representation in sports will not result in a violation of Title IX.[49] The 1996 Clarification emphasized that this third alternative should be considered a more viable option than case history would suggest.[50]

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42. *Id.*; George, *supra* note 17, at 1117.

43. Marshall-Freeman et al., *supra* note 15, at 10.

44. U.S. DEP'T. OF EDU., OFF. FOR CIVIL RIGHTS, *Clarification of Intercollegiate Athletics Policy Guidance: The Three-Part Test* (Jan. 16, 1996), https://www2.ed.gov/about/offices/list/ocr/docs/clarific.html.

45. George, *supra* note 17, at 1117; Demery, *supra* note 5, at 381.

46. OCR Policy Interpretation, 44 Fed. Reg. 77,418 (Dec. 11, 1979).

47. George, *supra* note 17, at 1117.

48. Ollier v. Sweetwater Union High Sch. Dist., 768 F.3d 843, 858 (9th Cir. 2014).

49. Marshall-Freeman et al., *supra* note 15, at 13.

50. George, *supra* note 17, at 1119.

B. The Equal Protection Clause

While the contact sport exception prevents some athletes from legal recourse under Title IX, student athletes may be able to bring a claim for sex discrimination under the Equal Protection Clause of the Fourteenth Amendment.[51] The Equal Protection Clause states "[n]o State shall . . . deny to any person within its jurisdiction the equal protection of the laws."[52] The Fourteenth Amendment initially dealt with racial inequality.[53] In 1971, the Supreme Court extended Fourteenth Amendment protection to gender classifications.[54] In *Reed v. Reed*, the Supreme Court found that when a state actor discriminates on the basis of gender, the state action is subject to intermediate constitutional scrutiny.[55] Since federally funded schools constitute state actors, the Equal Protection Clause provides student athletes with a cause of action for gender discrimination.[56]

This Section will look at the level of intermediate scrutiny applied to sex discrimination claims established by *Mississippi University for Women v. Hogan* and *United States v. Virginia*, and the judicial interpretation of sex discrimination in sports cases like *Hoover v. Meikeljohn, Force v. Pierce,* and *Adams v. Baker* under the Equal Protection Clause.[57] Lastly, this Section will point out the limits that Title IX places on Equal Protection claims.

1. Intermediate Scrutiny

The pivotal case *Mississippi University for Women v. Hogan* established that gender is a *quasi*-protected class entitled to constitutional protection under the Equal Protection Clause.[58] The Court determined that classifications based on gender must satisfy intermediate

51. U.S. CONST. amend. XIV.

52. U.S. CONST. amend. XIV, § 1.

53. Loving v. Virginia, 388 U.S. 1, 10 (1967) ("The clear and central purpose of the Fourteenth Amendment was to eliminate all official state sources of invidious racial discrimination in the States."). *See also* Demery, *supra* note 5, at 390.

54. Reed v. Reed, 404 U.S. 71, 74–77 (1971) (court held that the Equal Protection Clause applied to gender discrimination). *See also* Demery, *supra* note 5, at 384.

55. *Reed*, 404 U.S. at 75–76.

56. Adams v. Baker, 919 F. Supp. 1496 (D. Kan. 1996) (prohibition of girls from a high school wrestling team created an equal protection claim); Leffel v. Wisconsin Interscholastic Athletic Ass'n, 444 F. Supp. 1117 (E.D. Wis. 1978) (class action challenging exclusion of girls from boys' contact and non-contact sports teams as a violation of the Fourteenth Amendment).

57. *See generally* Miss Univ. for Women v. Hogan, 458 U.S. 718 (1982); United States v. Virginia, 518 U.S. 515 (1996); Hoover v. Meikeljohn, 430 F. Supp. 164 (D. Colo. 1977); Force v. Pierce City R-VI Sch. Dist., 570 F. Supp. 1020 (W.D. Mo. 1983); Adams v. Baker, 919 F. Supp 1496 (D. Kan. 1996).

58. *See generally Hogan*, 458 U.S. at 718.

scrutiny, not simply rational basis review, under the Equal Protection Clause.[59] The Court clarified that the proper test for gender discrimination is whether "the gender-based classification is substantially related to an important governmental objective."[60] The State has the burden.[61] In an attempt to justify its exclusion of male students from the nursing program, the school in *Hogan* asserted that the admissions policy "compensate[d] for discrimination against women and, therefore, constitute[d] affirmative action."[62] The Court found the school's affirmative action argument unpersuasive because the admissions policy perpetuated "fixed notions concerning the roles and abilities of males and females."[63] In other words, the exclusion of male applicants from the all-women's nursing program perpetuated the stereotypical notion that nursing is a woman's job. The Court further stated that "[c]are must be taken in ascertaining whether the objective itself reflects archaic and stereotypic notions. Thus, if the statutory objective is to exclude or 'protect' members of one gender because they are presumed to suffer from an inherent handicap or to be innately inferior, the objective itself is illegitimate."[64] For this reason, the Court in *Hogan* held that an all-women's nursing program's refusal to admit a male applicant was unconstitutional.[65]

The Court in *United States v. Virginia* elevated the level of scrutiny for gender discrimination cases by requiring the state to prove an "exceedingly persuasive" justification for the discriminatory provision rather than an "important" one.[66] In applying this heightened intermediate scrutiny, the Court held that the exclusion of women from the Virginia Military Institute was unconstitutional because the separate women's institute for leadership was insufficient, thereby denying women the same opportunity available to men.[67] The Court reasoned that the exclusion of women from the military academy originated from historical stereotypes, and that so-called "gender-based developmental differences" and the view that women tend to "thrive in a cooperative atmosphere whereas males 'tend to need an atmosphere of adversativeness,'" were an impermissible basis upon which to exclude

59. *Id*.

60. *Id.*

61. *Id.*

62. *Id.* at 727; Jenny L. Matthews, *Admission Denied: An Examination of a Single-Sex Public School Initiative in North Carolina*, 82 N.C. L. REV. 2032, 2045 (2004).

63. *Hogan*, 458 U.S. at 725.

64. *Id.*

65. *Id.*

66. 518 U.S. 515, 533 (1996).

67. *Id*.

women.[68] Furthermore, the Court stated that the defendant may not rely on "overbroad generalizations about the different talents, capacities, or preferences of males and females" to justify the exclusion of one sex.[69] The justification must be genuine, not hypothesized and not a pro-hoc rationalization.[70]

2. Sex Discrimination in Sports Under the Equal Protection Clause

In the context of sex discrimination in sports, courts historically upheld various governmental objectives as "important" under the intermediate scrutiny standard, including protecting women from injury.[71] For example, the court in *Lafler v. Athletic Board of Control* held that the detrimental effects on women's safety justified the exclusion of women from participating against men in boxing competitions.[72] However, after *United States v. Virginia* established a higher level of scrutiny, female student athletes have successfully argued that although protecting women from injury is an important governmental interest, it is not exceedingly persuasive when compared to the need to redress past discrimination against women in athletics.[73]

In most cases, the excluding school district or athletic association has attempted to justify the complete exclusion of women from men's teams by asserting student safety as the important or exceedingly persuasive governmental objective.[74] While the courts have agreed that safety was an important objective in the abstract, they have found that the exclusion of women was not substantially related to student safety because (1) it was based on group generalizations and assumptions rather than individualized assessment of the athletes' abilities;[75] (2) the application of the student safety objective was inconsistent between men and women that were both at risk of injury;[76] and (3) other non-discriminatory alternatives were available to protect the athletes from injury.[77]

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68. *Id*.

69. *Id*.

70. *Id*.

71. Demery, *supra* note 5, at 384.

72. 536 F. Supp. 104, 107 (D.C. Mich. 1982).

73. Demery, *supra* note 5, at 385.

74. George, *supra* note 17, at 1126.

75. *See* Hoover v. Meikeljohn, 430 F. Supp. 164 (D. Colo. 1977); Force v. Pierce City R-VI Sch. Dist., 570 F. Supp. 1020, 1029 (W.D. Mo. 1983); Darrin v. Gould, 540 P.2d 882 (Wash. 1975).

76. *See* Adams v. Baker, 919 F. Supp 1496, 1500 (D. Kan. 1996).

77. *See* Leffel v. Wisconsin Interscholastic Athletic Ass'n, 444 F. Supp. 1117, 1122 (E.D. Wis. 1978).

a. Safety Rationale Is Based on Group Generalizations and Stereotypical Assumptions

The courts have consistently held that the student safety rationale does not justify the exclusion of women because it is based on generalizations and assumptions about the inferior ability of female athletes. In *Hoover v. Meikeljohn*, the court rejected the Colorado High School Activities Association's argument that allowing girls to play would expose them to an inordinate risk of injury and granted the female plaintiff access to the high school boys' soccer team.[78] The court recognized the innate biological difference between men and women, but emphasized that there is a greater difference among male athletes than there is between male and female athletes.[79] Smaller, weaker male athletes are also at risk of injury from competition with larger, stronger male athletes, but there is no required physical criteria or protective exclusionary mechanism in place for these weaker male athletes, so there need not be one for female athletes.[80] The court recognized that if the health and safety of athletes is the asserted governmental interest, it should be applied to these smaller males as well. The fact that it is not destroys the safety rationale entirely and emphasizes that this patronizing protection of female athletes is an unconstitutional gender classification.[81] Furthermore, the court stated that "[a]ny notion that young women are so inherently weak, delicate or physically inadequate that the state must protect them from the folly of participation in vigorous athletics is a cultural anachronism unrelated to reality."[82]

Similarly, the court in *Force v. Pierce City R-VI School District* noted that gender classifications perpetuate stereotypic notions of the proper roles of men and women and concluded that safety arguments based on stereotypes "suggest the very sort of well-meaning but overly 'paternalistic' attitude about females which the Supreme Court has viewed with concern."[83] The court reasoned that the safety logic was flawed because it was founded on the view that a "typical"

78. 430 F. Supp. 164 (D. Colo. 1977).

79. *Id.* at 169 ("the range of differences among individuals in both sexes is greater than the average differences between sexes").

80. *Id.* ("The failure to establish any physical criteria to protect small or weak males from the injurious effects of competition with larger or stronger males destroys the credibility of the reasoning urged in support of sex classification. Accordingly, to the extent that governmental concern for the health and safety of anyone who knowingly and voluntarily exposes himself or herself to possible injury can ever be an acceptable area of intrusion on individual liberty, there is no rationality in limiting this patronizing protection to females who want to play soccer.").

81. *Id.*

82. *Id.*

83. 570 F. Supp. 1020, 1029 (W.D. Mo. 1983).

woman is more injury-prone than a "typical" man, but not all women or men are "typical."[84] The court in *Lantz v. Ambach* further emphasized that the safety rationale is based on generalization, rather than clear data.[85] The court stated that a physically fit and qualified female athlete does not have the opportunity to show that she is as fit, if not more fit, than the weakest of the male members on the team "simply because she is a girl."[86]

Additionally, courts have found that Equal Protection analysis requires individualized considerations and does not allow group-based exclusions. For example, in *Darrin v. Gould* two sisters challenged the regulations of the Washington Interscholastic Athletic Association that prohibited girls from playing on the high school football team.[87] The Supreme Court of Washington found the exclusion of women without an individualized determination of their qualifications was unconstitutional under the Equal Protection Clause.[88] The court stated "If any individual girl is too weak, injury-prone, or unskilled, she may, of course be excluded from competition on that basis but she cannot be excluded solely because of her sex without regard to her relevant qualifications."[89] Similarly, the court in *Packel v. Pennsylvania Interscholastic Athletic Ass'n* found the defendant's complete bar of female participation in male athletics was unconstitutional under the Equal Protection Clause.[90] The court noted that even if the school offered teams for both sexes, the provision would still be unconstitutional because denying a talented and qualified girl the opportunity to compete at a potentially higher level on a boys' team could not be justified under the notion of equality.[91]

b. Safety Rationale Is Inconsistently Applied to Male and Female Athletes

The court in *Adams v. Baker* pointed out the inconsistent application of the safety factor between boys and girls.[92] In this case, the school's wrestling coach testified to the level of strength, conditioning, and speed needed to participate on the men's wrestling team.[93] He

84. *Id.* at 1028.
85. 620 F. Supp. 663, 665 (S.D.N.Y. 1985).
86. *Id.*
87. 540 P.2d 882 (Wash 1975).
88. *Id*. at 891.
89. *Id.*
90. 334 A.2d 839, 840 (Pa. Commw. Ct. 1975).
91. *Id.*
92. 919 F. Supp 1496, 1500 (D. Kan. 1996).
93. *Id.*

stated that the female plaintiff could only bench 120 pounds, whereas the average boy could bench between 145 and 200 pounds.[94] The coach used this measurement as a justification for the exclusion of the female athlete from the men's wrestling team despite the fact that boys were not required to demonstrate that they could lift over 200 pounds to try out.[95] The coach also testified to the various injuries associated with wrestling, but later admitted that the risk of injury was not more serious to female athletes than to males.[96]

c. Availability of Non-Discriminatory Alternatives

The court in *Leffel v. Wisconsin Interscholastic Athletic Ass'n* found that the complete bar of women from male contact sports was not substantially related to the important governmental interest of protecting women from injury because less restrictive alternatives were available.[97] The court suggested two alternatives to the complete bar of coeducational teams: "(1) dropping all varsity interscholastic competition, and (2) establishing separate girls teams for contact sports."[98] Additionally, the court refused to accept the athletic association's view that women should be completely excluded from participation in men's athletics simply because they are biologically inferior and more injury-prone.[99]

3. Limitations of the Equal Protection Clause

Although plaintiffs have been more successful when bringing a claim under the Equal Protection Clause than Title IX, such success is limited. The Equal Protection Clause only allows injunctive relief, and by the time the athlete can bring her suit against the educational institution or athletic association, her claim may be moot because she has either graduated or exceeded the age of eligibility to play on the desired team.[100] Additionally, Title IX limits the applicability of the Equal Protection Clause for female student athletes seeking gender equality. In *Smith v. Robinson*, the Court held that if the constitutional right the litigant seeks to vindicate through § 1983 is "virtually

94. *Id.*
95. *Id.*
96. *Id.*
97. 444 F. Supp. 1117, 1122 (E.D. Wis. 1978).
98. *Id.*
99. *Id.*
100. *See, e.g.*, Gomes v. R.I. Interscholastic League, 604 F.2d 733, 736 (1st Cir. 1979) (The court vacated the case as moot because, by the time the case was decided, the male student athlete had already graduated from high school and, thus, the injunction allowing him to participate on the women's volleyball team was moot.).

identical" to the statutorily conferred right, then the litigant cannot bring the § 1983 claim.[101] In other words, the Equal Protection claim will be superseded by the Title IX claim, and plaintiffs will be limited to recovery under Title IX and the unfavorable precedent associated with it.

C. Title VII

Title VII makes it unlawful "to discriminate against any individual with respect to his compensation, terms, conditions, or privileges of employment, because of such individual's race, color, religion, sex or national origin."[102] Justice John Paul Stevens explained the importance of Title VII as follows:

> Before the Civil Rights Act of 1964 was enacted, an employer could fashion his personnel policies on the basis of assumptions about the differences between men and women, whether or not the assumptions were valid. It is now well recognized that employment decisions cannot be predicated on mere "stereotyped" impressions about the characteristics of males and females. Myths and purely habitual assumptions about a woman's inability to perform certain kinds of work are no longer acceptable reasons for refusing to employ qualified individuals, or for paying them less.[103]

Justice Stevens thus explained that use of stereotypes and class-based generalizations is not an acceptable employment evaluation method. More importantly, Title VII was enacted to prohibit the use of such class-based assumptions about a woman's employment abilities.

Courts typically analyze Title VII claims under one of three theories of gender discrimination: individual disparate treatment, systemic disparate treatment, or disparate impact.[104] Disparate treatment refers to direct or circumstantial evidence of intentional discrimination.[105] Disparate impact relates to "an employer's neutral employment practice [that] has had a discriminatory effect on a protected class of which the plaintiff is a member."[106] This Comment will focus on disparate treatment analysis as it applies to female athletes.

In a disparate treatment case, the plaintiff must first provide a prima facie case by proving: (1) she is a member of a protected class; (2) plaintiff applied and was qualified for the employment in question; (3) plaintiff was rejected; and (4) the job remained open after rejec-

101. Smith v. Robinson, 468 U.S. 992, 1009 (1984).
102. 42 U.S.C. § 2000e-2(a)(1) (2012).
103. L.A. Dep't of Water & Power v. Manhart, 435 U.S. 702, 707 (1978).
104. Davis v. Dist. of Columbia, 949 F. Supp. 2d 1, 7 (D.D.C. 2013).
105. *Id.* at 8.
106. Linda Sharp et al., Sports Law: A Managerial Approach 107 (2007).

tion and the employer continued the job search among similarly qualified applicants.[107] Once a prima facie case is established, the burden shifts to the employer to articulate a legitimate nondiscriminatory reason.[108] Once the employer provides a legitimate nondiscriminatory reason, the burden shifts back to the plaintiff to show that the employer's reasons were pretext based on the preponderance of the evidence.[109]

For systemic disparate treatment, a plaintiff must establish a discriminatory practice or pattern using statistics demonstrating substantial underrepresentation of a protected group relative to numbers expected under random hiring.[110] The employer can challenge the factual basis on which the plaintiff's case rests or rebut the inference of discrimination from the statistical showing by offering a nondiscriminatory explanation.[111] An employer may respond to a prima facie case of discrimination by "citing a legitimate nondiscriminatory reason, business necessity, or a bona fide occupational qualification (BFOQ)."[112] If an employer can meet this burden, the burden shifts back to the plaintiff to establish that the employer's defense is pretext.[113]

Under the BFOQ exception in Title VII providing that an employer may discriminate on the basis of "religion, sex, or national origin in those certain instances where religion, sex, or national origin is a bona fide occupational qualification reasonably necessary to the normal operation of that particular business or enterprise," the term "occupational" refers to qualifications that affect an employee's ability to do the job.[114] The safety exception within the BFOQ defense to sex discrimination claims is only applied when the employee's sex actually interferes with her ability to work.[115]

This Section will provide the case history of Title VII and the BFOQ exception. Section C.1 looks at *Price Waterhouse v. Hopkins*[116] to show that an employer cannot rely on sex stereotypes and an indi-

107. 42 U.S.C. § 2000e-5 (2018); McDonnell Douglas Corp. v. Green, 411 U.S. 792 (1973).

108. *Id*. (burden of production not persuasion).

109. *Id*.

110. Teamsters v. United States, 431 U.S. 324 (1977).

111. EEOC v. Sears, Roebuck & Co., 839 F.2d 302, 313 (7th Cir. 1988).

112. Dennis, *supra* note 39, at 359 (examples of BFOQs: need and privacy interests of the employer's clientele; business necessity; safety concerns for female employees; reliance on statutes or government policy).

113. SHARP ET AL., *supra* note 106, at 108.

114. 42 U.S.C § 2000(e)-2(e)(1). *See also* Int'l Union, UAW v. Johnson Controls, Inc., 499 U.S. 187, 188 (1991).

115. § 2000(e)-2(e)(1); *Johnson Controls*, 499 U.S. at 188.

116. *See generally* 490 U.S. 228 (1989).

vidual's failure to conform to such sex stereotypes when making an adverse employment decision. Section C.2 looks at *City of Los Angeles Department of Water and Power v. Manhart*[117] to show that Title VII precludes an employer from creating personnel policies and practices on the basis of generalizations and assumptions about the differences between men and women, regardless of whether such sex generalizations are true. Section C.3 examines *International Union, UAW v. Johnson Controls, Inc.*[118] to show that the safety exception to the BFOQ is limited to instances in which sex actually interferes with an employee's ability to perform the job. Section C.4 discusses *Dothard v. Rawlinson*[119] to show that Title VII protects a woman's decision to weigh and accept the risks of employment unless such risks are to third parties whose safety is indispensable to the particular business. Section C.5 looks to *Diaz v. Pan American World Airways*[120] to show that the preference of co-workers, clients, customers and other third parties does not justify the exclusion of an entire sex of employees unless the employer can provide a factual basis that all or substantially all members of that class cannot adequately perform the essential functions of the job.

1. Price Waterhouse v. Hopkins*: Individual Disparate Treatment*

In *Price Waterhouse v. Hopkins*, a female attorney filed a Title VII sex discrimination claim against her firm for denying her a partnership position due to sex-based evaluations.[121] The Supreme Court held that sex stereotyping played a part in evaluating the plaintiff's candidacy and the defendant firm failed to prove by a preponderance of evidence that the same decision would have been justified absent the discriminatory intent.[122]

Ann Hopkins had worked for Price Waterhouse for five years and maintained and secured successful major contracts for the partnership, including a $25 million contract with the Department of State the year prior to her candidacy.[123] While Hopkins was praised by partners and clients for her competence and assertiveness, staff members often complained about her "abrasiveness."[124] As a result, her partner eval-

117. *See generally* 435 U.S. 702 (1978).
118. *See generally* 499 U.S. 187 (1991).
119. *See generally* 433 U.S. 323 (1977).
120. *See generally* 442 F.2d 385 (1971).
121. 490 U.S. 228, 233 (1989).
122. *Id*. at 258.
123. *Id*. at 233.
124. *Id.* at 234.

uations contained negative remarks about her interpersonal skills.[125] Several evaluations stated that Hopkins was "overly aggressive, unduly harsh, difficult to work with and impatient with staff."[126]

While some evaluations expressed legitimate concerns, several others reacted negatively to Hopkins' personality simply because she was a woman.[127] For example, "[o]ne partner described her as 'macho'; another suggested that she 'overcompensated for being a woman'; a third advised her to take 'a course at charm school'. Several partners criticized her use of profanity . . . 'because it's a lady using foul language.'"[128] One partner advised Hopkins to walk, talk, and dress more femininely, to wear make-up, to have her hair styled, and to wear jewelry.[129] These sharply critical remarks about Hopkins' interpersonal skills and appearance constituted sex stereotyping.[130] In the specific context of sex stereotyping, "an employer who acts on the basis of a belief that a woman cannot be aggressive, or that she must not be, has acted on the basis of gender."[131] In finding that Hopkins' sex was a motivating factor in the employment decision, the Court stated:

> we are beyond the day when an employer could evaluate employees by assuming or insisting that they matched the stereotype associated with their group . . . . An employer who objects to aggressiveness in women but whose positions require this trait places women in an intolerable and impermissible catch 22: out of a job if they behave aggressively and out of a job if they do not.[132]

The Court emphasized that an individual's failure to conform with sex-based stereotypes does not justify an adverse employment decision. Gender nonconformity is not a legitimate nondiscriminatory reason and reliance on sex-based stereotypes constitutes discrimination.

The lower court judge found evidence that the firm generally disfavored female partners and often evaluated female candidates on sex-based terms.[133] The judge found that "candidates were viewed favorably if partners believed they maintained their femin[in]ity while becoming effective personal managers," and "[o]ne partner repeatedly commented that he could not consider any woman seriously as a partnership candidate and believed that women were not even capable of

125. *Id.* at 235.
126. *Id.*
127. *Price Waterhouse*, 490 U.S. at 235.
128. *Id.*
129. *Id.*
130. *Id.* at 236 (according to social psychologist Dr. Susan Fiske).
131. *Id.* at 250.
132. *Id.* at 251.
133. *Price Waterhouse*, 490 U.S. at 236.

functioning as senior managers."[134] The judge concluded that some of the partners' remarks about Hopkins "stemmed from an impermissibly cabined view of the proper behavior of women" and Hopkins' failure to conform to their ideal gender stereotypes.[135]

In determining whether the firm denied Hopkins a partnership decision because of her sex, the Court interpreted the causal language of the statute as a condemnation of mixed-motive decisions—those based on a mixture of legitimate and illegitimate considerations.[136] In other words, an employer's decision is "because of sex" even if the employer considered legitimate factors in addition to the sex-based factors.[137] While the plaintiff must show that the employer relied on sex-based factors, the employer can avoid liability in a mixed-motive case by showing that it would have come to the same decision even if gender was not taken into account.[138]

The *Price Waterhouse* case established a "same decision" proof structure to balance the employer's freedom to make business decisions with Title VII's prohibition of employment decisions based on sex. In summation, an employer cannot make employment decisions based on gender, but an employer may decide against a woman for other legitimate nondiscriminatory reasons.[139]

2. City of Los Angeles Department of Water and Power v. Manhart*: Systemic Disparate Treatment*

In *City of Los Angeles Department of Water and Power v. Manhart*, the Supreme Court held that the city department's policy of making female employees contribute more money to the pension fund violated both the language and policy of Title VII.[140] More specifically, the Court found that the employment practice discriminated against individual female employees because of their sex in violation of § 703(a)(1) of the Civil Rights Act of 1964.[141]

The department's retirement benefits were entirely funded by employee contributions.[142] Each employee was eligible for a monthly retirement benefit computed as a fraction of his or her salary multiplied

134. *Id.*
135. *Id.* at 237.
136. *Id.* at 241.
137. *Id.*
138. *Id.* at 242.
139. *Price Waterhouse*, 490 U.S. at 243.
140. 435 U.S. 702 (1978).
141. *Id.* at 702–03.
142. *Id.*

by the employee's years of service.[143] While the monthly benefits for men and women of the same age, seniority, and salary were equal upon retirement, female employees were required to contribute more of their paycheck to the pension fund during their employment.[144] As a result, female employees took home less pay than their male counterparts because the employee pension contribution was withheld from employee paychecks.[145]

The city department attempted to justify the different contribution requirements by claiming that the cost of an average female employee's pension was greater than that of the average male retiree because its female employees, on average, will live a few years longer than its male employees.[146] Since female employees would generally require more retirement benefits, the city felt they should be required to contribute more to the pension fund. It followed, according to the city department, that it would be unfair to male employees to require them to pay an equivalent amount into the pension fund when they would not be receiving an equivalent benefit.[147] In other words, fairness to male employees required the differential in take-home pay between the sexes because it offset the difference in the value of the pension benefits provided to each sex.[148] For this reason, the city department claimed that "the differential was based on a factor 'other than sex'" and was, therefore, not discrimination within the meaning of § 703(a)(1).[149]

The Court critiqued the city department's use of gender-based characteristics about men and women as general classes as inconsistent with Title VII's focus on the individual.[150] Title VII precludes treatment of individuals as simple components of a sexual class.[151] It requires fairness to individuals rather than fairness to the class.[152] In other words, the statute prevents employers from fashioning personnel policies and practices based on generalizations and assumptions about the differences between each sex as a whole, even if such class-based assumption are valid.[153] Although the generalization that women, as a class, live longer than men was accepted as "unquestiona-

143. *Id.* at 705.
144. *Id.*
145. *Id.*
146. *Manhart*, 435 U.S. at 705 (based on a study of mortality tables and personal experience).
147. *Id.* at 709.
148. *Id.* at 706.
149. *Id.*
150. *Id.* at 707.
151. *Id.* at 708–09.
152. *Manhart*, 435 U.S. at 708–09.
153. *Id.* at 707.

bly true" by both parties, the use of such a generalization was impermissible because "all individuals in the respective classes do not share the characteristic that differentiates the average class representatives."[154] The city department provided no substantial proof that its individual female employees lived longer than its individual male employees.[155] Therefore, the Court reasoned that the city department's pension policy constituted discrimination under Title VII because it classified employees in terms of their sex instead of their individual characteristics.[156]

Manhart established that "[e]ven a true generalization about the class is an insufficient reason for disqualifying an individual to whom the generalization does not apply."[157] The case shifted the focus of Title VII analysis to characteristics of the individual rather than generalizations of the class.

3. International Union, UAW v. Johnson Controls, Inc.*: Bona Fide Occupational Qualification*

In *International Union, UAW v. Johnson Controls, Inc.*, the Court held that the company's policy of excluding all fertile female employees from jobs involving actual or potential lead exposure was facially discriminatory under Title VII.[158] A facially discriminatory policy under Title VII can only be defended by the establishment of a BFOQ.[159] Here, the Court found that the employer's policy of exclusion did not satisfy the safety exception to a BFOQ because a female employee's fertility did not interfere with her ability to perform her job.[160]

In this case, the employer's policy required female employees to provide medical documentation of their infertility before working in battery manufacturing jobs.[161] Male employees were not required to provide the same medical proof of infertility despite evidence of the debilitating effect of lead exposure on the male reproductive system.[162] Therefore, fertile men, but not fertile women, were allowed to decide for themselves whether or not they wanted to assume the risk

154. *Id.* at 708.
155. *Id.* at 708–709.
156. *Id.* at 710–11.
157. *Id.* at 708.
158. 499 U.S. 187, 199–200 (1991).
159. *Id.*
160. *Id.* at 204.
161. *Id*. at 192.
162. *Id.* at 198.

of injuring their reproductive health for a job.[163] In this way, the company policy contained a facial classification based on gender because it excluded only women of childbearing age, not men, from jobs with inherent lead exposure.[164]

For this reason, the Court held that the company's policy facially discriminated against its female employees on the basis of their potential for pregnancy, thereby violating both Title VII and the Pregnancy Discrimination Act of 1978.[165] In addition, the Court explained that the "absence of a malevolent motive [did] not convert a facially discriminatory policy into a neutral policy with a discriminatory effect."[166] The employer, therefore, was required to defend the explicit gender-based policy as a BFOQ.[167]

The Court interpreted the BFOQ defense narrowly. It explained that the BFOQ defense "limits the situations in which discrimination is permissible to 'certain instances' where sex discrimination is 'reasonably necessary' to the 'normal operation' of the 'particular' business."[168] The Court indicated that the use of the term "occupational" in the statute referred to "objective, verifiable requirements [that] must concern job-related skills and aptitudes."[169] To satisfy the Court's narrow interpretation of BFOQ, the job qualification must go to the business' "essence" or "central mission."[170]

The company argued that the policy of exclusion satisfied the safety exception to BFOQ because the company enacted the policy to ensure the safety of all female employees' unborn fetuses.[171] In response, the Court held that the "safety exception is limited to instances in which sex or pregnancy actually interferes with the employee's ability to perform the job."[172] Here, the employer failed to show any "factual basis for believing that all or substantially all women would be unable to perform safely and efficiently the duties of the job involved," and,

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163. *Id*. at 197.

164. *Johnson Controls*, 499 U.S. at 197.

165. *Id*. at 199 ("In its use of the words, 'capable of bearing children' in the 1982 policy statement as the criterion for exclusion, Johnson Controls explicitly classifies on the basis of potential for pregnancy. Under the PDA, such a classification must be regarded, for Title VII purposes, in the same light as explicit sex discrimination.").

166. *Id.*

167. *Id.* at 200.

168. *Id.* at 201.

169. *Id.*

170. *Johnson Controls*, 499 U.S. at 203 (citing Dothard v. Rawlinson, 433 U.S. 323, 333 (1977)).

171. *Id.* at 202.

172. *Id.* at 203.

therefore, the employer did not establish a BFOQ.[173] Since the employer could not establish a BFOQ, the policy was facially discriminatory on the basis of sex, and thus violated Title VII.

Johnson Controls established a narrow interpretation of the safety exception to the BFOQ. To sufficiently establish a BFOQ defense after this case, an employer must show that (1) the particular job requires exclusion of "all or substantially all" members of a particular group, and (2) the BFOQ relates to the essence or central mission of the employer's business.[174] This interpretation prevents the use of general, subjective standards as a justification for any policy of exclusion based on sex.

4. Dothard v. Rawlinson*: Disparate Impact*

In *Dothard v. Rawlinson*, a female who sought employment from the Alabama Board of Corrections as a prison guard brought suit under Title VII alleging that she had been denied employment because of her sex.[175] The plaintiff was refused employment because she failed to meet the weight requirement established by an Alabama statute.[176] The plaintiff challenged the height and weight requirement, and the administrative regulation that established a gender criteria for assigning correctional counselors to maximum-security institutions for "contact positions."[177]

The height and weight requirements did not contain explicit facially discriminatory language like the policy in *Johnson Controls*, but the plaintiff asserted that "these facially neutral qualification standards work in fact disproportionately to exclude women from eligibility for employment by the Alabama Board of Corrections."[178] The Court looked to the disparate impact test established by *Griggs v. Duke Power Co.*[179] to determine if the plaintiff showed that the facially neutral height and weight requirements selected applicants for hire "in a significantly discriminatory pattern."[180] Here, the height requirement (a minimum of five feet, two inches tall) would "exclude 33.29% of women in the United States between the ages of 18-79, while exclud-

173. *Id.* at 207 (citing *Dothard*, 433 U.S. at 333).

174. *Id.*

175. 433 U.S. 323 (1977).

176. *Id*. at 323–24.

177. *Id*. at 324–26 (contact positions referred to those that required continual close physical proximity to inmates).

178. *Id*. at 329.

179. *See generally* 401 U.S. 424 (1971).

180. *Dothard*, 433 U.S. at 329.

ing only 1.28% of men between the same ages."[181] The weight requirement (a minimum of 120 pounds) would exclude 22.29% of the women and 2.35% of the men in this same age group.[182] The Court found this statistical evidence satisfactory to establish a prima facie case of discrimination.[183]

To rebut a plaintiff's prima facie case, an employer must show that the requirement at issue has a "manifest relationship" to the job.[184] Here, the employer argued that the height and weight requirements related to strength and argued that strength is an essential element to the job as a correctional counselor but failed to offer any specific evidence to justify this assertion.[185] The Court suggested that a test directly measuring strength, rather than using the height and weight requirements as a proxy for strength, would be more appropriate if strength is actually a bona fide, job-related quality.[186] Furthermore, the Court stated that a fairly administered test for strength would fully satisfy Title VII because it would "'measure the person for the job and not the person in the abstract.'"[187] Since other selection devices could have been used without a similar discriminatory effect, the Court concluded that the height and weight requirements were prohibited under Title VII.[188]

The Court did, however, uphold the employer's regulation explicitly prohibiting women from working in contact positions in male correctional facilities as a BFOQ.[189] The Court initially stated that Title VII generally prohibits an employer from making an employment decision because of sex-based stereotypes about the class as a whole.[190] Furthermore, the argument that a particular job is too inherently dangerous for women as a class is often rejected as a BFOQ because the purpose of Title VII is to allow the individual employee the opportunity to decide whether or not to accept the risk of injury inherently associated with a particular employment position.[191] Here, however, more was at stake than a woman's decision to accept the risks of em-

181. *Id.*

182. *Id.* at 329–30 (stating that the reliance on general population demographic data instead of the potential applicant pool was not misplaced).

183. *Id.* at 330.

184. *Id.* at 329 (citing *Griggs*, 402 U.S. at 424).

185. *Id*. at 332 ("a sufficient but unspecified amount of [strength] is essential to effective job performance as a correctional counselor").

186. *Dothard*, 433 U.S. at 332.

187. *Id.* at 332 (quoting *Griggs*, 402 U.S. at 436).

188. *Id.*

189. *Id.* at 331.

190. *Id.* at 333.

191. *Id.* at 335.

ployment.[192] The violent, disorganized environment of the prison and the prevalence of criminally-convicted sex offenders presented "a real threat not only to the victim of the assault [the female guard,] but also to the basic control of the penitentiary and protection of its inmates and the other security personnel."[193] Additionally, the Court reasoned that sex was related to the guard's ability to maintain prison security, the essence of employment as a correctional counselor.[194] For these reasons, the Court accepted the employer's BFOQ for the job of correctional counselor in a contact position in a male maximum-security penitentiary.[195]

Dothard allowed an employer to discriminate on the basis of sex only because the safety of third parties that were indispensable to the particular business were at risk, and the employer established a high correlation between sex and the ability to perform job functions. The Court did not, however, allow the employer to use sex as a proxy for strength. Throughout its decision, the court stressed Title VII's protection of a woman's right to weigh and accept the risks of employment—even dangerous employment that may place her in harm's way.

5. Diaz v. Pan American World Airways*: Third-Party Preference*

In *Diaz v. Pan American World Airways*, the Fifth Circuit held that being female did not constitute a BFOQ for a flight attendant position and the employer's refusal to hire male flight attendants solely because of their sex constituted a violation of Title VII.[196] The court stated that "discrimination based on sex is valid only when the *essence* of the business operation would be undermined by not hiring members of one sex exclusively."[197]

The plaintiff applied for a flight attendant job with Pan American Airlines but was rejected because Pan Am had a policy of restricting the flight attendant position to females only.[198] The plaintiff filed suit with the Equal Employment Opportunity Commission (EEOC) alleging that Pan American Airlines violated Title VII by refusing to employ him on the basis of sex.[199] Pan American Airlines argued that restricting the flight attendant position to female employees was "reasonably necessary to the normal operation of Pan American's busi-

192. *Dothard*, 433 U.S. at 335.
193. *Id*. at 336.
194. *Id.* at 335.
195. *Id*. at 337.
196. 442 F.2d 385, 386 (1971).
197. *Id.* at 388 (emphasis added).
198. *Id*. at 386.
199. *Id.*

ness."[200] The employer alleged that female flight attendants "were *superior* in such non-mechanical aspects of the job" like "providing reassurance to anxious passengers, giving courteous personalized services" and "making flights as pleasurable as possible . . . ."[201] The trial court found that Pan Am's passengers preferred female flight attendants.[202] With this in mind, the trial court determined that the female-only policy effectively screened out unsatisfactory applicants and that an elimination of this policy would result in a reduction of performance.[203]

In reversing the trial court's BFOQ finding, the Fifth Circuit adopted the EEOC guidelines which stated that "the bona fide occupational qualification as to sex should be interpreted narrowly" and the language of the exception compels close scrutiny.[204] Furthermore, the court stated that Congress did not intend for the BFOQ to allow an employer to "legitimately discriminate against a group solely because his employees, customers, or clients discriminated against that group."[205] The preference of third parties did not justify the discrimination practiced by Pan Am because the BFOQ exception requires a "business *necessity* test, not a business *convenience* test."[206] In other words, discrimination based on sex is valid "only when the *essence* of the business operation would be undermined by not hiring members of one sex exclusively."[207]

Here, the court found that the inclusion of male flight attendants would not jeopardize the airline's primary function of transporting passengers safely.[208] The essence of the airline is to provide safe travel, not to ensure a pleasant environment enhanced by the "obvious cosmetic effect" of female stewardesses that provide non-mechanical functions of the job.[209] The court did not dismiss the employer's ability to consider an individual's performance of the non-mechanical functions of the job; however, the court emphasized that an employer is not justified in excluding all males simply because most males may not perform the non-mechanical aspects of the job as adequately as females.[210] Since the employer failed to provide a factual basis that all

200. *Id.* (citing 29 C.F.R. 1604.1 (2012)).
201. *Id*. at 387 (emphasis added) (internal quotations omitted).
202. *Diaz*, 442 F.2d at 387.
203. *Id.* at 387–88.
204. *Id.* at 387.
205. *Id.*
206. *Id.* at 388 (emphasis added).
207. *Id.* (emphasis added).
208. *Diaz*, 442 F.2d at 388.
209. *Id.*
210. *Id.*

or substantially all men would not be able to perform the job safely and efficiently, the court concluded that the BFOQ exception did not apply.

Diaz established a test for determining whether or not an employer's discriminatory employment practice falls within the BFOQ exception. The Fifth Circuit stated that "[b]efore sex discrimination can be practiced, it must not only be shown that it is impracticable to find the men that possess the abilities that most women possess, but that the abilities are *necessary* to the business, not merely tangential."[211] Additionally, the preferences of co-workers, the employer, clients, or customers do not provide a justification for the exclusion of a protected class because it is these very prejudices and preferences that Title VII was meant to overcome.[212]

II. Analysis

Title IX was enacted over forty years ago with the goal of remedying the history of sex discrimination in education and educational activities.[213] The presence of the contact sport exception, however, is in direct conflict with this purpose. It acts as a complete bar to female participation in a wide array of sports.[214] As a result, this history of exclusion that Title IX sought to remedy is still in effect and, more importantly, is statutorily mandated. To prevent further exclusion of female athletes from contact sports and to adequately effectuate Title IX's ban on sex discrimination in education and educational activities, the legislature must eliminate the contact sport exception.

Additionally, the contact sport exception is unconstitutional and inconsistent with the Equal Protection Clause. Although student athletes have been able to recover under the Equal Protection Clause for claims of sexual discrimination in athletics, this recovery is limited. Under the Equal Protection Clause, student athletes can only seek injunctive relief and most suits will become moot before they can be decided.[215] Additionally, case law suggests that courts may require student athletes to rely on Title IX as the superseding statute, thereby barring recovery under the Equal Protection Clause.[216] Since the Equal Protection route is limited and Title IX claims are often defeated by the contact sport exception, the only way to allow female

211. *Id.* at 388–89 (emphasis added).
212. *Id.*
213. 20 U.S.C. § 1681 (2018).
214. George, *supra* note 17, at 1107.
215. *See supra* Section I.B.3.
216. *Id.*

athletes to participate in male contact sports is to change the law. Congress needs to rescind the contact sport exception and reopen the gates to the football fields and the doors to the basketball courts. Rescission will give female student athletes the opportunity to try out for male contact sports. It will force athletic programs to base their determinations on each student athlete's individualized abilities and condemn the use of stereotypical generalizations about female student athletes as a class.

Section A will argue that the contact sport exception is unconstitutional under the Equal Protection Clause because the complete exclusion of female athletes from contact sports is not substantially related to the important, or exceedingly persuasive, government interest of protecting student athletes.

Section B will then analyze the contact sport exception under Title VII and argue that the complete exclusion of female athletes from male contact sports would constitute a formal policy of discrimination based on sex under systemic disparate treatment. More specifically, this cross-statutory analysis will adopt the employment law framework to emphasize the unconstitutionality of the contact sport exception as an unjustifiable exclusion of a protected class from a type of activity. This cross-statutory analysis is not meant to provide an alternative litigation strategy for female athletes seeking relief from gender discrimination in athletics.[217] It is directed at the legislature, not the courts, to support the elimination of the contact sport exception and to highlight the inconsistencies between two statutes that share an intimately related objective—the elimination of sex discrimination.

A. The Contact Sport Exception Is Unconstitutional

A purpose of the Equal Protection Clause is to remove "legislative classifications which distribute benefits and burdens on the basis of gender [because they] carry the inherent risk of reinforcing stereotypes and the 'proper place' of women and their need for special protection."[218] The contact sport exception creates such a classification and explicitly excludes female athletes from male contact sports. The contact sport exception is, therefore, inconsistent with the Equal Protection Clause because it intentionally discriminates against female athletes on the basis of sex and permits schools to engage in this bla-

217. Currently, student athletes do not have standing to challenge the contact sport exception under Title VII because they are not considered employees. *See infra* Section III.A.

218. Orr v. Orr, 440 U.S. 268, 283 (1979) (holding an Alabama statute requiring only husbands, not wives, to pay alimony upon divorce unconstitutional).

tantly offensive sex-based discrimination.[219] When the constitutionality of the contact sport exception has been challenged, schools and athletic associations have contended that Congress included the contact sport exception out of a genuine concern to protect female athletes from unacceptable injury rates.[220] Although the protection of female athletes is an important governmental interest, various courts have held that the contact sport exception is not substantially related and is, therefore, unconstitutional.[221] More specifically, the contact sport exception is not substantially related to the important government interest of protecting student athletes from harm because the safety rationale is based on group generalizations and stereotypes and the exclusion of all women is inconsistent with the inclusion of weaker, smaller male athletes that are similarly prone to injury.[222]

1. Application of the Equal Protection Clause

The contact sport exception and the associated safety rationale allows schools and athletic associations to evaluate athletes based on the abilities associated with their sex. It relies on generalized stereotypes about females as inherently weak and in need of governmental protection.[223] Such a class-based evaluation is both underinclusive and overinclusive. It is *underinclusive* because it fails to protect smaller, weaker males from the injuries inherent in participating in contact sports with bigger, stronger males. It is *overinclusive* because it excludes strong and skilled female athletes that may be more physically qualified to compete than the weakest male. Rather than relying on a class-based evaluation, schools and athletic associations should evaluate athletes based on their individual qualifications. This would protect the unskilled, weak athletes from any injuries associated with participating in contact sports with stronger athletes—regardless of whether those athletes are male or female.

Courts have held that individual considerations, or tryouts, are a more accurate way of not only protecting the safety of female athletes, but also protecting the safety of weaker male athletes.[224] These courts have emphasized that the biological evidence does not justify a class-based evaluation. While evidence shows that "males as a class tend to

219. Demery, *supra* note 5, at 376.

220. George, *supra* note 17, at 1129.

221. *See, e.g.*, Hoover v. Meikeljohn, 430 F. Supp. 164, 169 (D. Colo. 1977); Packel v. Pennsylvania Interscholastic Athletic Ass'n, 334 A.2d 839, 839 (Pa. Commw. Ct. 1975).

222. *See supra* Section I.B.2.

223. *See Hoover*, 430 F. Supp. at 164; Force v. Pierce City R-VI Sch. Dist., 570 F. Supp. 1020, 1029 (W.D. Mo. 1983); Darrin v. Gould, 540 P.2d 882 (Wash 1975).

224. *See Hoover*, 430 F. Supp. at 164; *Force*, 570 F. Supp. at 1029; *Darrin*, 540 P.2d at 882.

have an advantage in strength and speed over females as a class and that a collision between a male and a female would tend to be to the disadvantage of the female," class based discrimination is impermissible when "the evidence also shows that the range of differences among individuals of both sexes is greater than the average differences between the sexes."[225] In other words, the existence of certain characteristics, like speed and strength, in one sex does not justify classification based on sex. If an individual, male or female, is too weak, slow or unskilled, then that individual may be excluded from competition on *that* basis but should not be excluded solely because of her sex.[226] In order for the contact sport exception to be substantially related to athletic safety, there would have to be evidence that every single female athlete is weaker than every single male athlete, and that just simply is not the case.

Additionally, athletic programs that exclude women from participating in a contact sport solely based on sex violate the Equal Protection Clause because they rely on stereotypes of male and female talents, capacities, or preferences.[227] The proposed governmental interest of safety ignores the possibility that some female athletes may be more physically qualified to compete on men's teams than the weakest male members. This safety rationale is flawed because it is rooted in generalized stereotypes about the average physical differences between men and women as distinct classes and does not consider the athletes individually.[228] The notion that women are inherently weak and in need of governmental protection from the injurious effects associated with competition with male athletes is archaic and patriarchal and, more importantly, inconsistent with the refusal to do the same for weak male athletes. Such gender classifications "carry the inherent risk of reinforcing the stereotypes about the 'proper place' of women and their need for special protection."[229] An athlete should be evaluated based on his or her individual characteristics and abilities, not on the basis of sex. If the female athlete is shown to be weaker at practice than the smallest male, then she may be cut based on her inability to compete at the level necessary to adequately contribute to the team. Similarly, if a male player is shown to be

225. *Hoover*, 430 F. Supp. at 169.

226. *Packel*, 334 A.2d at 843.

227. Kelsey R. Chapple, *Sports for Boys, Wedding Cakes for Girls: the Inevitability of Stereotyping in Schools Segregated by Sex*, 94 TEX. L. REV. 537, 542 (2016).

228. Blake J. Furman, *Gender Equity in High School Sports: Why There is a Contact Sports Exception to Title IX, Eliminating It, and a Proposal for the Future*, 17 FORDHAM INTELL. PROP. MEDIA & ENT. L.J. 1169, 1178 (2007).

229. Orr v. Orr, 440 U.S. 268, 283 (1979).

weaker at tryouts than a female athlete, then he may be cut based on his inability to compete at the necessary level. The sex of the player should not be determinative of his or her ability to participate in the sport.

Thus, the contact sport exception is not substantially related to the important governmental interest of protecting athletes from injury because: it is based on generalizations about the abilities of females as a class; it is inconsistently applied to males and females that are similarly situated and equally exposed to injury; and it does not consider less discriminatory alternatives such as individualized considerations or tryouts. Therefore, the contact sport exception must be rescinded because it is unconstitutional and perpetuates the stereotype that females are second-class athletes in need of governmental protection.

2. Limitations of the Equal Protection Clause

Although the majority of gender discrimination in athletics claims are successful under the Equal Protection Clause, the outcome of success is limited.[230] Litigation is expensive, and remedy is limited to injunctive relief. The injunction that provides female athletes with the opportunity to play may be too late and the cases may be deemed moot because "the student-athlete may have already graduated or chosen not to participate."[231] The cost and possibility of the case becoming moot before recovery dissuades many women from litigating and seeking the opportunity to participate in contact sports.

The inability to succeed on an enforceable remedy under the Equal Protection Clause and the unfavorable precedent in Title IX cases discourages female student athletes from challenging the contact sport exception and shields the legislature from recognizing the need for reform. The next Section provides a new argument for challenging the contact sport exception—an argument under Title VII's employment discrimination—with the hope of awakening the legislature to instill change in the world of female athletics.

B. Cross-Statutory Analysis: Title IX's Contact Sport Exception Is Impermissible Under Title VII's Disparate Treatment Analysis

Since the unconstitutionality of the contact sport exception has not already caused the legislature to rescind the contact sport exception,

230. *See supra* Section I.B.3.

231. Demery, *supra* note 5, at 386–87; Gomes v. R.I. Interscholastic League, 604 F.2d 733, 736 (1st Cir. 1979).

this Comment hopes to spark the conversation by pointing out the inconsistencies between the contact sport exception in Title IX and the judicial system's application of Title VII regarding sex discrimination in employment. The same analysis that courts have adopted in employment discrimination cases can be used to support the rescission of the contact sport exception in Title IX. To illustrate, this Section will provide a theoretical analysis of the contact sport exception under Title VII's systemic disparate treatment analysis.[232] First, it will provide a prima facie case that the contact sport exception would constitute a formal policy of discrimination against female athletes. Second, it will provide the school's defense of the contact sport exception as a BFOQ. Third, it will show that the BFOQ safety rationale would be pretextual and, therefore, discriminatory against female athletes.

Title VII makes it unlawful for an employer "to discriminate against any individual with respect to his compensation, terms, conditions, or privileges of employment, because of such individual's race, color, religion, sex or national origin."[233] Although Title VII only restricts employers from discriminating against employees, this Section borrows the statutory framework of Title VII to analyze the contact sport exception under Title IX. In this analogy, the educational institutions represent the employer, the female athletes represent the employee, and the contact sport exception represents the employment policy at issue. In other words, the female athletes would be challenging the educational institution's compliance with or enforcement of the contact sport exception as a formal policy of discrimination based on sex.

The student athlete would bring this claim under the systemic disparate treatment analysis of Title VII because the contact sport exception would be a facially discriminatory policy that affects the class of female athletes as a whole.[234] The proof structure applied to formal policies under systemic disparate treatment is as follows:

(1) the plaintiff must establish the existence of a formal policy that discriminates against a protected group;
(2) once the plaintiff establishes a formal policy, the burden shifts to the defendant to establish an affirmative defense of
    (a) bona fide occupational qualification, or

232. This is a purely theoretical inquiry and is not meant to be interpreted as a new cause of action for female student athletes. Student athletes do not currently have standing to challenge the contact sport exception under Title VII because neither the federal courts nor the legislature have considered them employees under Title VII. *See infra* Section III.A.

233. 42 U.S.C. § 2000e-2(a)(1) (2012).

234. *See supra* notes 104–115 and accompanying text (explaining the three different theories of discrimination under Title VII: individual disparate treatment, systemic disparate treatment, and disparate impact).

(b) voluntary affirmative action; and

(3) if the defendant satisfies their burden of establishing a BFOQ or a voluntary affirmative action, the burden shifts back to the plaintiff to show that the defendant's arguments are pretextual.[235]

The following Section will adopt this framework to argue that the contact sport exception would constitute a formal policy of discrimination against women because it relies on generalized sex stereotypes of the class as a whole and it does not consider the qualifications of the individual athlete.[236] This Section will also argue that the safety defense for the contact sport exception would clearly not be a voluntary affirmative action and would not constitute a BFOQ because the sex of the athlete does not interfere with her ability to play the contact sport. Finally, this Section will argue that the BFOQ is pretext.

It is important to note, however, that this Section is not suggesting that a female athlete could or should seek relief for sex discrimination in school athletics under Title VII because as current case precedent shows, student athletes are not yet considered employees under Title VII.[237] Rather, this Section is aimed at the legislature to demonstrate the inconsistencies between Title VII and Title IX, two statutes that share a closely related purpose of eliminating sex discrimination.[238]

1. Formal Policy of Discrimination

The contact sport exception intentionally discriminates on the basis of sex by excluding women from participating in male contact sports.[239] The Code of Federal Regulations explicitly states that "members of the excluded sex must be allowed to try-out for the team offered *unless the sport involved is a contact sport.*"[240] By mentioning the protected class—sex—in the text of the regulation, the contact sport exception constitutes a facially discriminatory policy. Under Title VII, such an intentional exclusion of a protected class constitutes a formal policy of discrimination when the exclusion (a) relies on gener-

235. *See* McDonnell Douglas Corp. v. Green, 411 U.S. 792 (1973).

236. *See infra* notes 239–251 and accompanying text.

237. *See infra* Section III.A.

238. For a discussion on the differences between the applicability of Title IX and Title VII regarding collegiate athletics, see Elizabeth Reinbrecht, *Northwestern University and Title IX: One Step Forward for Football Players, Two Steps Back for Female Student Athletes*, 47 U. TOL. L. REV. 243 (2015).

239. 34 C.F.R. § 106.41(b) (2000). While the statute also does not allow a male athlete to participate in a female contact sport, the focus of this Comment is on the exclusion of female athletes.

240. § 106.41(b) (emphasis added).

alized stereotypes of the class as a whole and (b) does not consider the qualifications of the individual.

The exclusion of female athletes from male-dominated contact sports like men's football and basketball assumes that female athletes are weaker, slower, and essentially second-class athletes. Although these generalizations may be true of the class of women as a whole, the use of such a generalization is impermissible because "all individuals in the respective classes do not share the characteristic that differentiates the average class representatives."[241] *Price Waterhouse* and *Manhart* established that Title VII precludes an employer from relying on generalizations, assumptions, and stereotypes about the differences between men and women, regardless of whether such generalizations are true, when making an adverse employment decision.[242] Similarly, an educational institution should be precluded from relying on the stereotypical assumption that female athletes are typically more injury-prone than male athletes when denying an individual the opportunity to participate in a contact sport.[243]

In *Price Waterhouse*, Justice Stevens articulated the need for change in employers' reliance on generalized sex stereotypes as an evaluation mechanism because individual employees may not match the stereotypes associated with their group.[244] Similarly, an educational institution or athletic program should not be allowed to evaluate an athlete by assuming that she matches the stereotype associated with her sex, i.e., that she is too weak or fragile to play a contact sport with males. In *Price Waterhouse*, Ann Hopkins' aggressiveness and success countered the stereotypical assumption that female attorneys are docile, quiet, or overly feminine, yet she was punished for not conforming to such stereotypes and instructed to act and dress more femininely to achieve a partnership position.[245] Similarly, female athletes like Heather Mercer did not align with the sex-based assumption that females are too weak to sufficiently contribute to male contact sports, yet she was punished for not conforming to such stereotypes and instructed to try beauty pageants instead of playing football.[246] Strong female athletes should not be sidelined because they do not conform to society's stereotypical assumptions about their athletic abilities;

241. L.A. Dep't of Water & Power v. Manhart, 435 U.S. 702, 708 (1978).

242. Price Waterhouse v. Hopkins, 490 U.S. 228, 258 (1989); *Manhart*, 435 U.S. at 707.

243. Force v. Pierce City R-VI Sch. Dist., 570 F. Supp. 1020, 1024–25, 1029 (W.D. Mo. 1983).

244. *Price Waterhouse*, 490 U.S. at 251.

245. *Id.* at 234–35.

246. Mercer v. Duke Univ., 190 F.3d 643, 645 (4th Cir. 1999).

they should be allowed to demonstrate their abilities and try out for the team.

The Court in *Manhart* stated that Title VII "precludes treatment of individuals as simply components of racial, religious, sexual, or national class" and "requires that we focus on fairness to individuals."[247] In *Manhart*, the employer's pension policy was overturned because it classified employees in terms of their sex instead of their individual characteristics.[248] Similarly, the contact sport exception under Title IX should be eliminated because it classifies female athletes in terms of their sex instead of their individual athletic ability. The contact sport exception excludes qualified female athletes from even trying out for a male contact sport because of the generalized stereotypes about men and women.[249] As the Court in *Manhart* held, generalizations about a class do not justify the disqualification of an individual of that class to whom those generalization do not apply, even if such generalizations are true.[250] The focus must be on the individual rather than the generalization of the class.[251]

Therefore, the contact sport exception would constitute a formal policy of discrimination under Title VII because it facially discriminates against female athletes on the basis of their sex, and it relies on class-based generalizations as an evaluation mechanism.

2. Bona Fide Occupational Qualification

Once the athlete satisfies the burden of proving a formal policy of discrimination, the burden would shift to the educational institution to establish an affirmative defense.[252] Title VII provides two different types of affirmative defenses under systemic disparate treatment: voluntary affirmative action and bona fide occupational qualification.[253] Since the contact sport exception excludes a historically underrepresented group—women—an affirmative action defense would not suffice.[254] Therefore, the only option the educational institution would have for justifying the explicit sex discrimination present in the contact sport exception would be to show a BFOQ.

Under Title VII, the defining elements of a BFOQ are (1) the particular job requires the exclusion of all or substantially all members of

247. L.A. Dep't of Water & Power v. Manhart, 435 U.S. 702, 708–09 (1978).
248. *Id*. at 708, 711.
249. *Id*. at 707.
250. *Id*. at 708.
251. *Id*.
252. Int'l Union, UAW v. Johnson Controls, Inc., 499 U.S. 187, 221–22 (1991).
253. 42 U.S.C. § 2000e-2(e) (2018).
254. Ricci v. DeStefano, 557 U.S. 557 (2009).

a protected group and (2) the BFOQ relates to the essence or central mission of the employer's business.[255] In other words, any discrimination requirement must be job-related. Courts have interpreted BFOQ narrowly as an objective, verifiable requirement concerned with job-related skills and aptitudes.[256] When applied to sex discrimination in athletics, an educational institution or athletic program would attempt to satisfy the BFOQ elements by showing that the contact sport requires the exclusion of all or substantially all female athletes, and that sex relates to the essence of the contact sport.

a. Safety Exception

There is a specific safety BFOQ wherein an employer may argue that the safety of the individual requires his or her exclusion.[257] Here, the educational institution would attempt to justify the exclusion of female athletes from male contact sports to ensure the safety of female athletes. This is similar to the argument that educational institutions have used to justify the contact sport exception under the Equal Protection Clause.[258] Courts, however, have interpreted the safety exception of the BFOQ narrowly.[259] For example, in *Johnson Controls*, the Court concluded that an employer cannot use sex classifications to substitute its judgment about personal safety for that of the employees.[260] The Court rejected any justification for the exclusion of female employees from the battery assembly line other than the employee's ability to perform the job.[261] Furthermore, the Court reasoned that an employee's sex must actually interfere with the employee's ability to perform the job.[262] Similarly, a coach or athletic program would not be able to use sex classifications as a basis for excluding a female player from a sport with inherent risks and dangers. A female athlete's decision to participate in a male contact sport with inherent risks of injury should be no different than a male athlete's decision. More importantly, it should be *her* decision to assume the risk.

Additionally, the safety rationale would not satisfy the BFOQ if it is not based on objective sports-related requirements. Here, the safety

255. *Johnson Controls*, 499 U.S. at 197, 203.
256. *Id*. at 201.
257. *Id*. at 204.
258. *See supra* Section III.A.1.
259. Int'l Union, UAW v. Johnson Controls, Inc., 499 U.S. 187, 200–01 (1991).
260. *Id.* at 199 (finding employer was inappropriately discriminating when he banned women from working on a battery assembly line because of the potential exposure of lead to a developing fetus).
261. *Id.* at 206.
262. *Id.* at 204.

rationale behind the contact sport exception is founded on the stereotypical perception that male athletes are stronger than female athletes rather than an individualized consideration of the female athlete. The Court in *Dothard* stated that "it is impermissible under Title VII to refuse to hire an individual woman or man on the basis of stereotyped characterizations of the sexes."[263] Similarly, it would be impermissible to refuse to allow a female athlete to try out for a contact sport based on stereotyped characterizations of the female sex as inherently weak and delicate. Under Title VII, "the argument that a particular job is too dangerous for women may appropriately be met by the rejoinder that it is the purpose of Title VII to allow the individual woman to make that choice for herself."[264] Likewise, an argument that a particular sport is too dangerous for female athletes would appropriately be met by the rejoinder that the purpose of Title IX is to allow individual students to make the choice for themselves without the fear of sex discrimination limiting their opportunities. Just as Title VII protects a woman's "decision to weigh and accept the risks of employment," Title IX protects a woman's decision to participate in her chosen educational or athletic opportunity.[265]

While strength is an essential element of sports, the exclusion of an entire sex from a sport because its members are stereotypically weaker than the opposite sex is not justified because strength is not exclusively based on sex. Just as the employer in *Dothard* was required to provide an individualized test for measuring strength directly to fully satisfy Title VII, an athletic program would be required to allow female athletes to exhibit their strength and abilities through an individualized tryout.[266] The Court in *Dothard* required the employer to provide a test of strength that would measure "the person for the job and not the person in the abstract."[267] Similarly, an individualized tryout for a contact sports team would measure the athlete for the sport and not the athlete in the abstract. Since tryouts are an acceptable practice for determining the best males for a contact sport, the same practice should be applied for determining the best females.

b. Third-Party Preference

Additionally, the educational institution may ground its affirmative defense in the preference of third parties. More specifically, the edu-

263. Dothard v. Rawlinson, 433 U.S. 323, 334 (1977).
264. *Id*. at 335.
265. *Id*.
266. *Id*. at 332.
267. *Id*. (quoting Griggs v. Duke Power, 401 U.S. 424, 436 (1971)).

cational institution may argue that the elimination of female athletes from male contact sports is necessary to adhere to the preference of third-party spectators who prefer to watch male athletes compete with other male athletes without the distraction of female participation. This reasoning could also be applied to coaches that prefer to coach male athletes over female athletes.

The court in *Diaz* addressed a similar third-party preference rationale. In that case, the employer, Pan American Airlines, had a policy of excluding males from flight attendant positions because male passengers preferred the cosmetic benefit of female flight attendants.[268] The court rejected this third-party preference rationale because Congress did not intend for the BFOQ to allow an employer to "legitimately discriminate against a group solely because his employees, customers, or clients discriminated against a group."[269] This would perpetuate the history of sex discrimination against an underrepresented group. An educational institution would similarly not be allowed to discriminate against all female athletes simply because coaches, spectators, and fans discriminate against female athletes. The educational institution, like the employer in *Diaz*, would have to show that all or substantially all female athletes would not be able to play the contact sport in a safe and efficient manner—which, as shown above, is currently not the case.[270] The educational institution would need to conduct individualized tryouts to determine whether female athletes can safely participate in male contact sports. Therefore, the preference of athletic coaches and spectators would not justify the exclusion of female athletes from male contact sports just as the preference of male passengers in *Diaz* did not justify the exclusion of male flight attendants from airlines.

Thus, the contact sport exception would not qualify as a BFOQ affirmative defense under the safety rationale or the third-party preference reasoning because the sex of the athlete does not relate to the essence of the contact sport. Since the athlete's sex does not automatically interfere with her ability to play the sport, the exclusion of all or substantially all female athletes from contact sports is not a BFOQ.

In summation, the contact sport exception would constitute a formal policy of discrimination under Title VII because it is based on generalized stereotypes about female athletes as a class and does not focus on the qualifications of the individual. Additionally, the exclusion of all female athletes from contact sports does not directly relate

268. *See* Diaz v. Pan Am. World Airways, 442 F.2d 385, 386 (1971).
269. *Id.* at 387.
270. *See supra* Sections I.B.2., II.A.

to the essence or central mission of the contact sport because the sex of the athlete does not directly interfere with the athlete's ability to play the contact sport. For these reasons, the contact sport exception would be impermissible under Title VII.

3. Pretext

If the BFOQ defenses were accepted, however, the burden would shift back to the female athlete. She would have to show that the affirmative defenses are pretext for the legislature's intent to protect revenue-producing sports like men's football and basketball from female encroachment. This Section will attack the safety rationale.

The contact sport exception was the result of a congressional compromise.[271] Male legislators were concerned that a nondiscrimination mandate would damage college football and men's basketball by diverting funds and support from these sports.[272] They believed that "[t]he contact sports rule could help protect 'football as we know (and love) it' from encroachment by females."[273] The intent behind the contact sport exception is evidenced by the congressional hearings.[274] The Secretary of HEW, Caspar Weinberger, alluded to the contact sport exception as an accommodation to parties like the NCAA and Senator Tower who wanted revenue-producing sports excluded from Title IX entirely.[275] More specifically, Weinberger stated:

> [w]ith regard to athletics . . . Let's look first at what the regulation does not require . . . It does not require women to play football with men . . . it will not result in the dissolution of athletic programs for men . . . it does not mean that the National Collegiate Athletic Association (NCAA) will be dissolved . . . .[276]

By exempting contact sports, the contact sport exception implicitly exempted male-dominated, revenue-producing sports like football and basketball.[277] In this way, the contact sport exception served as a compromise to protect strong lobbying groups like the NCAA.

According to the contact sport exception in Title IX, a contact sport is one in which the "purpose" or "major activity" of the sport is con-

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271. *See supra* notes 15–22 and accompanying text.

272. *Id.*

273. George, *supra* note 17, at 1129.

274. *Sex Discrimination Regulations, Hearings before the House Subcommittee on Post-Secondary Education of the Committee on Education and Labor*, 94th Cong., 1st Sess., 438 (1975), at 438 [hereinafter Weinberger statement] (statement of Caspar W. Weinberger, Sec. of Dep't of Health, Educ., & Welfare).

275. Weinberger statement, *supra* note 274.

276. *Id.* at 439.

277. Demery, *supra* note 5, at 383.

tact.[278] The regulation enumerates a list of contact sports, including basketball, a game in which the purpose is not necessarily contact.[279] Although contact may be inevitable in basketball, the extent of the contact and the need for contact does not reach the level of sports like football and hockey. In fact, unnecessary contact in basketball is against the rules and constitutes a foul.[280] The questionable inclusion of basketball on the list of contact sports bolsters the assumption that the regulation was created to protect sports from female encroachment rather than to protect females from physical harm or danger.[281] The origin of the contact sport exception, therefore, was not to protect female athletes from harm. Rather, the legislative intent behind the contact sport exception was to protect the revenue-producing institutions of football and basketball.

For these reasons, the safety rationale would be considered pretext for the intent to protect revenue-producing sports from female encroachment and would not constitute a sufficient defense to retain the contact sport exception.

III. Impact

A. Applicability of Cross-Statutory Analysis in the Changing Sports Law Climate

This Comment has both a theoretical and practical impact. The analysis of the contact sport exception under Title VII's disparate treatment analysis is a theoretical contribution to the academic discourse surrounding the rescission of the contact sport exception from Title IX.[282] It provides another basis for why the contact sport exception is unconstitutional. This analysis could, however, become practical if student athletes are deemed employees by either Congress or the federal court system. Although this has yet to occur,[283] the recent

278. 34 C.F.R § 106.41(b) (2000).

279. § 106.41(b).

280. George, *supra* note 17, at 1129.

281. *Id.*

282. *See generally* Demery, *supra* note 5; Brown, *supra* note 9; George, *supra* note 17; Dennis, *supra* note 39; Matthews, *supra* note 62; Furman, *supra* note 228; Chapple, *supra* note 227; Jessica E. Jay, *Women's Participation in Sports: Four Feminist Perspectives*, 7 Tex. J. Women & L. (1997); Robert T. Zielinski, *College Athletes as Employees*, 41 J.C. & U.L. 71 (2015); Justin C. Vine, *Leveling the Playing Field: Student Athletes Are Employees of Their University*, 12 Cardozo Pub. L. Pol'y & Ethics J. 235 (2013); Omar A. Bareentto, *NCAA, It's Time to Pay the Piper: The Aftermath of* O'bannon v. NCAA *and* Northwestern v. College Athletes Players Association, 12 Rutgers Bus. L. Rev. 1 (2015); Reinbrecht, *supra* note 238.

283. *See* Rensing v. Indiana State Univ. Bd. of Trs., 444 N.E.2d 1170 (1983) (The court held that a student was not an employee of the university for the purpose of the state's workers' compensation act. The court noted that the agreements between the student and the university

case *Northwestern University v. College Athletes Players Association*[284] and the rise of state legislation permitting the compensation of student athletes for their "name, image and likeness"[285] may result in the employment status of student athletes. If student athletes become employees of their educational institutions, then they could potentially utilize the above statutory analysis under Title VII to combat the contact sport exception of Title IX as an unconstitutional policy of sexual discrimination.[286]

In fact, the argument by female student athletes to rescind the contact sport exception under Title VII could even be bolstered by these new name, image, and likeness laws. The student athletes that will benefit from these name, image, and likeness compensation laws will be predominately male football and basketball players because they are the ones that receive the most publicity and commercial attention. The contact sport exception's restriction of female athletes from these revenue-producing sports, therefore, not only restricts their opportunity to gain mental, physical, and emotional benefits, it restricts their access to the compensation now accessible under the name, image,

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did not disclose the requisite intent of either party to enter into an employee-employer relationship.); Coleman v. W. Michigan Univ., 336 N.W.2d 224 (1983) (The Michigan Court of Appeals applied the economic realities test and held that a student athlete is not an employee under the Fair Labor Standards Act.); Waldrep v. Texas Emp'rs Ins. Ass'n, 21 S.W.3d 692 (Tex. Ct. App. 2000) (Texas Court of Appeals declared that a student athlete could not be considered an employee and could not be awarded workers' compensation because the NCAA rules of eligibility require amateurism status.). *See generally* Zielinski, *supra* note 282; Vine, *supra* note 282.

284. Nw. Univ. I, 2014 NLRB LEXIS 221 (N.L.R.B. Mar. 26, 2014) (This case held that grant-in-aid scholarship football players at Northwestern are employees under the National Labor Relations Act.). *See generally* Bareentto, *supra* note 282; Reinbrecht, *supra* note 238.

285. While none of these state laws currently allow a student athlete to get paid directly from the institutions, it is a possibility. If that happens, these students can be categorized as employees and, in turn, be able to utilize the Title VII framework provided here to combat the contact sport exception. *See* California Fair Pay to Play Act, S.B. 206, 2019-20 Leg., Reg. Sess. (Ca. 2019); H.B. 3904, 101st Gen. Assemb., Reg. Sess. (Ill. 2019); S.B. 0660, 2019 Leg., Reg. Sess. (Mich. 2019); H.B. 5217, 2019 Leg., Reg. Sess. (Mich. 2019); H.B. 1564, 100th Gen. Assemb., 2d Reg. Sess. (Mo. 2020); H.B. 1792, 100th Gen. Assemb., 2d Reg. Sess. (Mo. 2020); H.B. 1748, 100th Gen. Assemb., 2d Reg. Sess. (Mo. 2020); S.B. 582, 2019 Leg., Reg. Sess. (Fla. 2020); S.B. 646, 2019 Leg., Reg. Sess. (Fla. 2021); H.B. 251, 2019 Leg., Reg. Sess. (Fla. 2020); H.B. 287, 2019 Leg., Reg. Sess. (Fla. 2020); H.B. 743, 2019-20 Leg., Reg. Sess. (Ga. 2020); H.B. 3347, 2020 Leg., Reg. Sess. (Okla. 2020); S.B. 935, 2019-20 Leg., 123rd Sess. (S.C. 2019); H.B. 4973, 2019-20 Leg., 123rd Sess. (S.C. 2020); H.B. 1694, S.B. 1636, Gen. Assemb., Reg. Sess. (Tenn. 2020); H.B. 1710, S.B. 1767, Gen. Assemb., Reg. Sess. (Tenn. 2020). The NCAA has also proposed a bill to Congress to establish national uniformity regarding the compensation for student athletes' name, image and likeness. Student-Athlete Equity Act, H.R. 1804, 116th Cong. (2019-2020); *see also Name, Image, and Likeness: The State of Intercollegiate Athlete Compensation: Hearing Before the Subcomm. on Manufacturing, Trade, and Consumer Protection*, 115th Cong. (Feb. 11, 2020), https://www.commerce.senate.gov/2020/2/name-image-and-likeness-the-state-of-intercollegiate-athlete-compensation.

286. This only applies to college student athletes.

and likeness laws. By restricting participation for females, this could lead to a disparate impact on their ability to access revenues from their name, image and likeness, because if women cannot at least try out for the men's football or basketball teams, then they have no ability to access the highest revenue-generating sports. Therefore, the name, image, and likeness laws serve as a new benefit to male student athletes, a benefit that female student athletes are prevented from utilizing because of the contact sport exception in Title IX. Female student athletes, if deemed employees, will be able to utilize this Comment's Title VII analysis to combat the discriminatory effects of the contact sport exception under both the systemic disparate treatment analysis and potentially the disparate impact analysis.

B. Physical, Mental, and Social Benefits Associated with Participation in Sports

This Comment is not just an intellectual exercise. It is important to understand why expanding female participation in athletics really matters. Participation in sports and physical exercise provides various health benefits to athletes including disease prevention and increased mental wellness.[287] Additionally, sports instill important life skills like discipline, respect, and teamwork that continue to benefit athletes in their academic, professional, and political lives.[288] A Nike advertisement from 1995 illustrates the impact sports can have on young girls:

> If you let me play, if you let me play sports. I will like myself more; I will have more self-confidence. If you let me play sports. If you let me play, I will be sixty percent less likely to get breast cancer; I will suffer less depression. If you let me play sports, I will be more likely to leave a man who beats me. If you let me play, I will be less likely to get pregnant before I want. I will learn what it means to be strong, if you let me play.[289]

The girls in this advertisement are sitting on the sidelines begging the world to let them play sports while the boys are playing catch on the nearby playground.[290] The image suggests a parallel to Heather Mercer, a strong, capable female kicker sidelined by a coach's stereotypical assumptions regarding a woman's role in the world of sports.[291]

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287. Nancy Leong & Emily Bartlett, *Sex Segregation in Sports as a Public Health Issue*, 40 CARDOZO L. REV. 1813, 1823–36 (2019); *12 Benefits of Sports Participation for Women*, WOMEN FITNESS MAGAZINE (Mar. 22, 2018), https://www.womenfitnessmag.com/12-benefits-of-sports-participation-for-women/ [hereinafter WOMEN FITNESS MAGAZINE]; Jay, *supra* note 282.

288. WOMEN FITNESS MAGAZINE, *supra* note 287; Jay, *supra* note 282, at 15.

289. *If You Let Me Play* (Nike commercial broadcast Oct. 3, 1995).

290. *Id.*

291. Mercer v. Duke Univ., 190 F.3d 643, 643 (4th Cir. 1999).

These images illustrate that girls are strong, but sidelined by the world's refusal to let them play sports. While Title IX has provided some progress in this area, the contact sport exception continues to exclude women from contact sports and perpetuates the assumption that women are second-class athletes. The presence of negative cultural and social biases against female athletes coupled with the sex segregation embedded in the contact sport exception discourages young women and girls from participating in sports entirely. In fact, almost half of the girls between the ages of three and seventeen do not participate in sports.[292] To encourage female participation in athletics and to provide females with an equal opportunity to reap the physical, mental and social benefits associated with playing sports, sex segregation—specifically the contact sport exception—must be eliminated.

The physical and sexual health benefits associated with participation in sports greatly affect women and girls. Some physical health benefits include: heart health, weight management, lower blood pressure, balanced cholesterol levels, enhanced immunity, diabetes control, and cancer prevention.[293] Preventing cardiovascular disease is particularly helpful to female athletes because it is the leading cause of death among women.[294] Similarly, breast cancer prevention is particularly important for young women and girls because breast cancer is the second-leading cancer-related cause of death among women.[295] One study showed that "physical activity was especially potent in preventing estrogen receptor-positive breast cancer, a type of cancer that tends to occur in younger women and tends to be more aggressive and fatal."[296] Additionally, participation in athletics cuts the risk of colon cancer among women in half.[297] Athletic participation can also improve sexual health.[298] One study found that adolescent girls who participate in sports are less likely to have unwanted pregnancies or be treated for sexually transmitted diseases in high school.[299] Adolescent female athletes are more likely to use birth control, seek professional health advice regarding sex, and undergo a gynecological examination.[300]

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292. WOMEN FITNESS MAGAZINE, *supra* note 287.

293. Leong & Bartlett, *supra* note 287, at 1823–27; WOMEN FITNESS MAGAZINE, *supra* note 287; Jay, *supra* note 282, at 10–11.

294. Leong & Bartlett, *supra* note 287, at 1823; WOMEN FITNESS MAGAZINE, *supra* note 287.

295. Leong & Bartlett, *supra* note 287, at 1824.

296. *Id.* at 1826.

297. *Id.*

298. *Id.* at 1827–28; Jay, *supra* note 282, at 12.

299. Leong & Bartlett, *supra* note 287, at 1828; Jay, *supra* note 282, at 12.

300. Leong & Bartlett, *supra* note 287, at 1828.

Participation in athletics can also improve an athlete's mental health.[301] Some mental health benefits include increased self-esteem and reduced risk of depression, suicide, and eating disorders.[302] Sports allow female athletes an opportunity to develop a "sense of appreciation" for their bodies.[303] One study noted that sports provide female athletes with "an empowering alternative to the conventional script of passive femininity" by encouraging them "to redefine their own bodies as tools for their own use rather than as objects of others' desire."[304] These feelings of empowerment result in positive body image, increased self-confidence and self-esteem, and can often prevent eating disorders.[305] Additionally, continued participation in athletics decrease current and future risks of depression among women.[306] In fact, female college athletes reported a one-third reduction in medically diagnosed depression when compared to their non-athlete female peers.[307]

There are several social benefits associated with participating in sports as well. The structure of sports encourages discipline, respect, teamwork, and overall character development.[308] In some sports, the team-based outlook instills healthy relationships with teammates, opponents, and authority figures—such as coaches, captains, and referees.[309] Individual sports, as well as team-based sports, foster the development of the discipline needed to cooperate and follow the rules of the sport as well as the discipline needed to improve the individual athlete and the team by working towards an objective.[310] The perseverance inspired in athletes after a difficult loss further develops their character and instills a competitive drive. These social benefits, as well as the mental and physical benefits, influence an athlete's academic and professional lives. For example, students who participate in sports receive higher grades and are more likely to graduate from high

301. *Id.* at 1830–36; WOMEN FITNESS MAGAZINE, *supra* note 287; Jay, *supra* note 282, at 12–14.

302. Leong & Bartlett, *supra* note 287, at 1830–36; WOMEN FITNESS MAGAZINE, *supra* note 287; Jay, *supra* note 282, at 12–14.

303. Leong & Bartlett, *supra* note 287, at 1831.

304. *Id.*

305. *Id.* at 1834–36 (Please note, however, that some sports may increase the likelihood of developing an eating disorder. For example, sports like gymnastics and track that focus on the leanness of an athlete's body may result in body image issues and eating disorders.). *See also* Jay, *supra* note 282, at 14.

306. Leong & Bartlett, *supra* note 287, at 1832.

307. *Id.* at 1833.

308. WOMEN FITNESS MAGAZINE, *supra* note 287; Jay, *supra* note 282, at 13.

309. WOMEN FITNESS MAGAZINE, *supra* note 287.

310. *Id.*

school and college.[311] Additionally, student athletes have a greater chance at pursuing and excelling in competitive jobs because they learn the values of teamwork, leadership, competition, and effective communication through sports.[312] In fact, "[e]ighty percent of women identified as key leaders in Fortune 500 companies participate[d] in sports during their childhood."[313]

The participation in contact sports with the opposite sex could potentially expand and extend these benefits. For example, a female athlete that plays against or with male athletes learns from a young age that she is strong enough to participate in this male-dominated world of sports. Similarly, the professional world is dominated by men, and female athletes who participated in contact sports with male athletes will have the self-confidence and competitive skills to fight for their place at the accounting firm, in the medical field, or at the courthouse. Some authors even "assert that competitive sports supply the first stage of pre-law training" because law school and law in practice are a "contest played within a very complex set of rules with clear winners and losers, not unlike any competitive sport."[314]

The contact sport exception and other forms of sex segregation in sports prevent women and girls from experiencing these physical, mental, social, and professional benefits associated with sports. This in turn, places women several steps behind men in their athletic, academic, professional, and political lives. The contact sport exception also tells girls that they are physically inferior to boys because they lack some athletic ability.[315] This creates a stigmatic harm and sports become a reminder of female inferiority, rather than a source of empowerment, self-esteem, and positive character development.[316] The damaging psychological experience of exclusion affects other areas of women's lives as well because "[g]irls who see themselves as unfit to play sports with boys will grow into women who may see themselves as unable to compete with men in other areas: academically, professionally, and politically."[317] In order to allow young women and girls the equal opportunity to derive the positive physical, mental, and social benefits associated with participation in sports, the contact sport exception and other forms of sex segregation in athletics must be re-

311. *Id.* at 15.
312. Jay, *supra* note 282, at 15.
313. *Id.*
314. *Id.* at 16.
315. *See generally* Leong & Bartlett, *supra* note 287.
316. *Id.*
317. *Id.* at 1846.

moved. Such a removal will allow women to compete for their spot on the field, in the courtroom, and at the table.

Conclusion

The contact sport exception should be eliminated from Title IX to effectuate the purpose of Title IX—providing equal opportunity for females in education and educational activities. Under the Equal Protection Clause, the contact sport exception is unconstitutional because the complete exclusion of females from contact sports is not substantially related to the important governmental interest of protecting the safety of athletes.[318] When applying the systemic disparate treatment analysis of Title VII to the contact sport exception of Title IX, the contact sport exception would constitute an illegal policy of discrimination based on sex because the policy relies on generalized stereotypes and assumptions about women as a class instead of allowing for individualized consideration of the qualifications of each athlete.[319] The safety rationale asserted by Congress and supporters of the contact sport exception does not qualify as a BFOQ under Title VII because an athlete's sex would not directly interfere with her ability to participate in the contact sport and, therefore, sex is not related to the essence of the sport.[320] For these reasons, the legislature must eliminate the contact sport exception to provide female athletes with an equal opportunity to participate in contact sports through individualized tryouts.

Opening the football gates and gymnasium doors gives young girls the opportunity to grow and develop intellectually, emotionally, and physically. Rescinding the contact sport exception will level the playing field both in the athletic arena and in the professional world. It will teach these female athletes that they are not second-class anything; that they can get off the sidelines and show the world their strength. If you let them play, they will show you their worth.

Katlynn Dee

318. *See supra* Section II.A.
319. *See supra* Section II.B.1.
320. *See supra* Sections II.B.2., II.B.3.